

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KYLE D. NELSON	:	ORDER
	:	DTA NO. 822547
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2001 through 2003.	:	

Petitioner, Kyle D. Nelson, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2001 through 2003.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel), brought a motion dated May 29, 2009 for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact and imposing a penalty for the filing of a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. The Division of Taxation submitted the affidavit of Sarah Dasenbrock, Esq., dated May 29, 2009 and the affidavit of Denise Palumbo, dated May 29, 2009, with annexed exhibits, in support of its motion.

Petitioner was granted leave until July 14, 2009 to respond to the Division's motion and, on that date, filed a two-page "Opposition" summarizing his arguments against the motion and a four-page memorandum against the motion. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on July 14, 2009. Based upon the motion papers and all the pleadings and proceedings had herein, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUES

- I. Whether additional tax due as asserted in three notices of deficiency should be sustained.
- II. Whether fraud penalties imposed under Tax Law §685(e) should be sustained.
- III. Whether a frivolous petition penalty should be imposed under the authority of Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. On February 22, 2005, the Division of Taxation (Division) issued to petitioner, Kyle D. Nelson, three notices of deficiency for the years 2001 through 2003 asserting additional income tax due as follows:

2001	2002	2003
\$1,229.00	\$3,324.00	\$3,227.00

2. Each of the notices of deficiency also asserts fraud penalties under Tax Law § 685(e)(1) and (2) and interest.
3. The Division's records indicate that, during the three years at issue, petitioner was employed by the New York City Transit Authority.
4. The Division has no record of any New York State income tax returns filed by petitioner with respect to any of the years at issue.
5. The Division calculated the tax deficiencies for the years at issue using wage and withholding tax information reported to the Division by his employer. Deductions were estimated based on petitioner's prior tax filings.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879 [2d Dept 1960]).

C. As noted, the Division asserts fraud penalty in this matter pursuant to Tax Law § 685(e)(1) and (2). The Division bears the burden of proving fraud (Tax Law § 689[e][1]).

For the Division to establish fraud by a taxpayer, it must produce “clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due

and owing” (*Matter of Sener*, Tax Appeals Tribunal, May 5, 1988; *see also*, *Schaffer v. Commissioner*, 779 F2d 849 [2nd Cir. 1985], 86-1 USTC ¶ 9132; *Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988).

The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (*Plunkett v. Commissioner*, 465 F2d 299 [7th Cir. 1972], 72-2 USTC ¶ 9541; *Biggs v. Commissioner*, 440 F2d 1 [6th Cir. 1971], 71-1 USTC ¶ 9306; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989, citing *Korecky v. Commissioner*, 781 F2d 1566 [11th Cir. 1986], 86-1 USTC ¶ 9232).

Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (*Foster v. Commissioner*, 391 F2d 727 [4th Cir. 1968], 68-1 USTC ¶ 9256; *Merritt v. Commissioner*, 301 F2d 484 [5th Cir. 1962], 62-1 USTC ¶ 9408). Understatement alone is not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud (*see, Foster v. Commissioner, supra*). (*Matter of Ellett*, Tax Appeals Tribunal, December 18, 2003.)

D. Upon review of the motion papers I find that factual issues regarding petitioner's intent must be resolved in order to determine whether the fraud penalty was properly imposed in this matter.

E. Inasmuch as a hearing will be necessary to resolve the fraud issue, this order will not address the issue of whether the additional tax due as asserted in the three notices of deficiency should be sustained. That issue will also be addressed at the hearing.

F. Until the questions of tax liability and fraud penalty are resolved, the issue of whether frivolous petition penalty should be imposed is premature.

G. The Division of Taxation's motion for summary determination is denied. This matter shall be scheduled for a hearing in New York, New York, on September 14, 2009.

DATED: Troy, New York
July 30, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE